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No. 64108-5-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

OAK HARBOR EDUCATION ASSOCIATION,

Appellant,

v.

OAK HARBOR SCHOOL DISTRICT,

Respondent.

BRIEF OF THE APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The superior court committed error in dismissing the Complaint of the Oak Harbor Education Association where the Association sought submission of an arbitrability dispute arising under its collective bargaining agreement with the Oak Harbor School District to an arbitrator for resolution in conformity with the parties' agreement.
2. The Superior Court misapplied the law of election of remedies and waiver to the facts of this case, and thereby should be reversed and the matter submitted to an arbitrator who should determine the viability of those defenses.

II. INTRODUCTION

This appeal is from a ruling of the superior court, Hon. Alan Hancock, that a grievance brought by the Oak Harbor Education Association ("Association" or "Union") against the Oak Harbor School District ("District") is not substantively arbitrable. The grievance disputes the District's termination of its teacher, James Pruss, for alleged misconduct.

James Pruss was a middle school physical education teacher for the District. In an incident occurring in February 2007, he was

accused of improperly touching a female student during gym activity. The matter was referred to local law enforcement authorities, and Mr. Pruss was charged by the Island County prosecutor in violation of criminal statute. Trial was scheduled for June 2007.

After the criminal charges issued, the District then terminated Mr. Pruss' employment on May, 2007. Mr. Pruss timely challenged that termination under applicable law. RCW 28A. 405.300 & .310. At the same time, the Association filed a grievance under its collective bargaining agreement ("CBA" or "Agreement") challenging the termination under its "just cause" provisions.

The District retained counsel, and a hearing officer was selected to hear the statutory appeal which was originally scheduled for August 20 and 21, 2007. However, Mr. Pruss' criminal trial was then postponed until September, 2007; Mr. Pruss, not wanting to testify at a hearing for which a verbatim record was created by statutory mandate, withdrew his request for an appeal before the hearing officer could rule on his pending request for a continuance. Instead, the Association continued to advance his termination grievance to the arbitration level.

After Mr. Pruss withdrew his statutory appeal, the criminal charges against him were dismissed with prejudice and no plea entered. The District, however, refused to allow the grievance challenging Mr. Pruss' termination to proceed to arbitration. The District contended that contractual language governing an election of remedies in such situations precluded the arbitration process from going forward where the employee had invoked the statutory appeal process.

The Association responded that the District's refusal to proceed raised a matter of substantive arbitrability. The Association argued that arbitrability questions were to be submitted to an arbitrator in the first instance under the express terms of the CBA. The District refused to so proceed.

The Association filed suit in Island County Superior Court to enforce the CBA provisions and compel submission of the arbitrability issue to an arbitrator. The parties filed cross-motions for summary judgment. The District raised several defenses to the arbitrability issue: election of remedies; waiver; res judicata; priority of action; and, collateral estoppels.

In a bench ruling after oral argument, the superior court granted summary judgment to the District. Essentially ruling that the

matter was not arbitrable, the court accepted the election of remedies defense proffered by the District as the basis for dismissing the Complaint to Enforce.

This appeal follows from that ruling.

III. STATEMENT OF THE CASE

A. Statement of Facts

1. The Accusation Against James Pruss.

During a school activity, Mr. Pruss was accused by a female middle school student of improperly touching her breast. CP 112. The student complained to administrators who retained an attorney, John Binns, to conduct an investigation. CP 112-114. Statements were taken from various witnesses and the matter was referred to local police. The police then referred the complaint to local prosecutors (Island County), who filed criminal charges against Mr. Pruss.

2. The District's Investigation.

While the matter was pending before local law enforcement authorities, the District continued its investigation. In particular, it demanded that Mr. Pruss submit to an interview of the alleged episode. CP 113-114. Mr. Pruss, on advice of his counsel, refused to answer questions specific to the accusation because of the

pendency of the criminal investigation. The District, without an assurance of use immunity of his statements from local prosecutors, thereafter terminated Mr. Pruss' employment on May 24, 2007. CP 249 - 51. It did so based upon the accusations of the student, an allegation that Mr. Pruss had intimidated a witness, and the other record information it had acquired, as well as Mr. Pruss refusal to answer questions during its investigation, which it viewed as insubordination. *Id.*

3. The Statutory Appeal – RCW 28A.405.300 & .310

Mr. Pruss timely challenged the District's termination decision under applicable statute. CP 252. The District and Mr. Pruss' counsel selected a hearing officer under RCW 28A.405.310, and a hearing was scheduled for August 20th and 21st of that same year. CP 149.

The criminal charges against Mr. Pruss were originally set for trial in June 2007.¹ The outcome of a criminal trial would be decisive, for an adverse outcome would have foreclosed further proceedings through the statutory appeal process. However, the

¹ No document was submitted to the court as part of the record for its review on this assertion; instead the court was referred to its own computer system to verify the status of the case which appeared at Island County District Co Court's criminal docket DD7020SX, Case No. 00059610. The assertions, however, were not disputed by the parties in their respective summary judgment pleadings.

trial was re-set to September, 2007 – well after the hearing date for Mr. Pruss’ statutory appeal. CP 123.

Initially, while a motion for summary judgment was pending before the hearing officer, brought by the District, Mr. Pruss sought a continuance of the statutory hearing pending completion of the criminal process. CP 233-35. Before the hearing officer ruled on his motion to continue or the summary judgment motion, Mr. Pruss withdrew his statutory appeal and instead sought his remedy through the CBA’s grievance-arbitration procedure. CP 242.

4. The Association’s Grievance Filing.

The District and the Association are parties to an Agreement that regulates the wages, hours, and terms and conditions of covered members’ employment. CP 106-111. Among its provisions is a conferred right by an employee to challenge adverse disciplinary action imposed by the District through the filing of a grievance. CP 110. The grievance procedure culminates in final and binding arbitration. *Id.*

After Mr. Pruss filed his request for statutory hearing, but within the applicable time-frames of the CBA,² the Association filed

² The time for an eligible individual to request a statutory appeal is ten (10) calendar days from receipt of a properly written and served

also a grievance on Mr. Pruss' behalf contesting his termination for lack of "just cause." CP 118. Despite Mr. Pruss' pursuit of his statutory appeal, the Association never withdrew the grievance, instead attempting repeatedly to meet with the District's superintendent (Richard Schulte) to discuss advancing the matter consistent with the CBA. CP 133 - 137.

The District repeatedly contended that the matter was not subject to the grievance procedure as Mr. Pruss had invoked the statutory appeal process. CP 133-135. However, once Mr. Pruss withdrew his statutory appeal, the District continued to refuse to proceed to arbitration, or to consider the grievance as a viable challenge to its termination decision. CP 135. Instead, the District contended that Mr. Pruss had chosen his remedy, and therefore was precluded from proceeding to grievance arbitration under the parties' CBA. *Id.*

The Association filed another grievance challenging the District's "interpretation" of the CBA. CP 239-41. In bringing this grievance, the Association contended that Mr. Pruss' right to challenge the District's termination of his employment raised a

notice of probable cause. RCW 28A.405.310(1). The time time-frame for filing a grievance under the collective bargaining agreement is twenty (20) calendar days. CP 110.

matter disputing the election of remedies language within the CBA. CP 239. Since contract language disputes were expressly a matter subject to the grievance procedure, the Association requested that the District first submit that issue to an arbitrator for a ruling. *Id.*

The District continued to refuse to have any matter related to James Pruss' termination submitted to an arbitrator for consideration.

5. James Pruss' Criminal Prosecution.

The criminal charges against Mr. Pruss were dismissed with prejudice on August 28, 2007.³ A further referral by the District to the Office of Professional Practices of the Office of the Superintendent of Public Instruction for investigation of professional misconduct was dismissed.⁴

B. Proceedings Before the Superior Court.

The Association filed suit against the District to compel the submission of the disputed issue – was James Pruss' grievance arbitrable – to an arbitrator for resolution. CP 450-452. The District

³ See, Island County District Court's criminal docket at DD7020SX, Case No. 00059610.

⁴ The appellate court may take judicial notice of this disposition by the Office of Professional Practices, though the standard for unprofessional conduct differs from that of misconduct in the workplace. See, WAC 181-87-005 – 181-87-095, particularly 181-87-080 re: "sexual misconduct with students."

Answered by asserting several affirmative defenses that were presented to the court for disposition. CP 444-449.

The parties filed cross-motions for summary judgment. CP 94-135; 259-286; The Association argued that the parties had negotiated a collective bargaining agreement that contained two methods of challenging disciplinary action by the District: (1) the filing of a statutory appeal; or (2) the filing of a grievance through arbitration. The District, by refusing to allow the termination grievance of Mr. Pruss to proceed, was essentially denying that it was arbitrable. Because the CBA contained a provision whereby arbitrability disputes were to be submitted to an arbitrator for first consideration,⁵ The Association simply wanted the court to Order the District to submit the parties dispute to an arbitrator for a ruling on that issue.

In its cross-motion, the District submitted arguments to the court on its specific defenses, to wit, that Mr. Pruss had already invoked his statutory appeal, that by doing so the grievance arbitration proceeding was foreclosed, that Mr. Pruss, now left without any remedy, had voluntarily chosen that path, and that the

⁵ The CBA contains the following pertinent language: "Grievances advanced to arbitration shall be submitted under and in accordance with the rules of the American Arbitration Association. . .Any question of arbitrability will be decided by the arbitrator." CP 109.

doctrines of election of remedies, priority of action, res judicata, equitable estoppel and waiver precluded the submission of the disputed grievance to an arbitrator.

The Association responded that the defenses raised by the District were properly submitted to an arbitrator on why the matter was not substantively arbitrable. In particular, the Association argued that the court was merely to decide whether the CBA provided for submission of the arbitrability question to an arbitrator, and if it concluded that the CBA so provided, then the matter should be submitted. CP 23-29.

After oral argument on July 17, 2009,⁶ Judge Hancock issued his ruling from the bench in favor of the District. CP 8-10. The Judge first found that two appellate court rulings advanced by the Association were inapplicable. The principal decision was that of the Supreme Court in *Mt. Adams Schl. Dist. v. Cook*, 150 Wn.2d 716, 81 P.3d 111 (2003), which held that issues of substantive arbitrability are for the courts to decide in the first instance, unless the parties' agreement clearly and unmistakably provides for the submission of the issue to an arbitrator. The Supreme Court ruled that the CBA in that decision clearly and unmistakably required the

⁶ VR at 15.

submission of the substantive arbitrability question to the arbitrator, rather than the courts.

The second case found inapplicable by the superior court was *Yakima County Law Enforcement Officers Guild v. Yakima*, 133 Wn.App. 281, 135 P.3d 558 (Div. 3 2006), which stands for the principle that arbitration should be ordered unless it is clear that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. VR at 6. The superior court further noted that arbitrators have jurisdiction to decide arbitrability defenses to include, without limitation, waiver, delay “and [the] like. . . .” *Id.*

The court found neither of these cases persuasive and distinguished each of them from application to the present matter upon the following reasoning:

In both of these cases the issues had to do with the proper construction of the collective bargaining agreement itself and whether under the terms thereof the grievant had a right to arbitration. By contract in the present case, the District’s defenses to [the Association’s contention that Mr. Pruss has the right to pursue arbitration under the collective bargaining agreement are not based on the collective bargaining agreement, but rather on independent principles of law.

VR at 7: 2-10.

Thereafter, the superior court evaluated the Association's demand that the District submit Pruss' termination grievance to arbitration under the election of remedies defense raised by the District. Applying *Birchler v. Castello Land Co.*, 133 Wn.2d 106, 942 P.3d 968 (1997), the court found that an election of remedies defense precluded submission of the arbitrability issue to an arbitrator. According to the ruling of *Birchler*, an election of remedies defense is available where (1) two or more remedies exist, (2) the "remedies must be repugnant and inconsistent with each other,"⁷ and (3) the party so bound has chosen the remedies.

VR at 8.

The court found that all elements were met. As to the first prong, it held

"The Court assumes for the sake of argument. . .that [the Association] had the remedy of pursuing the grievance under the collective bargaining agreement, and then, of course, Mr. Pruss had the other remedy of the statutory process under RCW 28A.405.300 through .310."

VR at 8: 8-14.

⁷ VR at 8: 2-3.

The court then rendered the following analysis of the second element:

The critical time is the time of the election, which in the present case was the outset of the proceedings when Mr. Pruss elected to pursue the statutory process.

As to the second element, the remedies are clearly repugnant and inconsistent with each other, as the OHEA actually acknowledged at the outset of the process. *The statutory process and the arbitration process are mutually inconsistent because they could conceivably allow double redress for the same alleged wrong, and pursuit of one necessarily precludes pursuit of the other.*

Id.: 18-25 (emphasis added).

The court, without citation to authority or record facts, further found the second element justified dismissal on grounds that “[I]f Mr. Pruss were [sic] allowed to pursue both processes, the arbitrator and the hearing officer could reach inconsistent conclusions on the same issues of tax⁸ and law, which is intolerable under the law.” VR at 9: 1-5.

⁸ While the Verbatim Report uses the word “tax” it is believed that the court actually used the word “facts” in rendering this opinion.

The court finally held that, despite the fact that the Mr. Pruss had independently pursued his statutory appeal while the Association was also pressing his grievance, this simultaneous assertion inexplicably imputed consequences to both:

[M]r. Pruss clearly chose the statutory process over the grievance process under the collective bargaining agreement, pursued it for weeks, and only at the end of the process, with the hearing officer poised to issue a decision, did he discontinue that process. As previously noted, *this had the legal effect of a final decision* since Mr. Pruss would be precluded from reinstating the statutory process because of the ten-day statute of limitations.

VR at 9: 6-14.

The court did not address the fact that the parties' CBA placed exclusive control over the advancement of grievances to the arbitration stage upon the Association. CP 110.⁹

⁹ Step 5 of the grievance procedure specifies that "If a decision [of the Superintendent or the School Board at Step 4] is not satisfactory to the grievant *and the Association, the Association may advance the grievance to arbitration*, within twenty (20) days after a decision is given to the Association." CP 110. (emphasis added). *Cf. Minter v. Pierce County Transit*, 68 Wash.App. 528, 535-36, 843 P.2d 1128 (1993) (re: election of remedies language in CBA allowed employee to bring wrongful termination action if grievance is not advanced to arbitration by the exclusive representative).

The court then held that the doctrine of election of remedies not only precluded Mr. Pruss from pursuing a grievance under the collective bargaining agreement, but barred his union as well.

The court further found that “the [Association] and Mr. Pruss waived the right to arbitrate.” VR at 9. Citing the general proposition that waiver arises where “voluntary relinquishment of a know right occurs,” the court then held that “A party may waive arbitration by failing to invoke an arbitration clause when legal action is commenced and arbitration is ignored.” VR 10: 1-4. The court cited *Lk. Washington Schl. Dist. 414 v. Mobile Modules N.W., Inc.*, 28 Wn.App. 59, 621 P.2d 791 (1980), and *Shoreline Schl. Dist. v. Shoreline Association of Education Office Employees*, 29 Wn.App. 956, 631 P.2d 996 (1981) in support of this ruling. From these decisions, the court held:

A waiver of an arbitration clause may be accomplished by implication because ordinarily if one party initiated court action in spite of an arbitration clause, the other party is entitled to an order staying the litigation. Thus, the party initiating the litigation may waive arbitration if that party fails to invoke the clause when an action is commenced and arbitration has been ignored.

VR 10:14-21.

The court then observed that “Mr. Pruss clearly pursued the statutory proceeding and never sought a stay in order to seek arbitration. The statutory process ran its course to the end when Mr. Pruss withdrew his request for relief for the statutory process and his action was dismissed.” VR 10 & 11. The court relied upon *Ives v. Ramsden*, 142 Wn.App. 369, 174 P.3d 1231 (2008), and *Otis Housing Assn, Inc. v. Ha*, 165 Wn.2d 582, 201 P.3d 309 (2009).

The court found that *Ives* was factually similar, and required its application to the facts surrounding Pruss’ prosecution of his statutory appeal. VR 12:4-5.

The court then observed that the *Otis Housing Association* case stood for the legal proposition that “a party waives a right to arbitration if it elects to litigate instead of arbitrate.” VR at 12:21-23. This holding of these decisions led the superior court to conclude that Mr. Pruss pursuit of his statutory remedies “rather than pursue the grievance process filed by the [Association] on his behalf” constituted a waiver by the Association of its right to arbitrate. VR at 13:1-5.

The court concluded that the District's asserted defenses of election of remedies and waiver barred further pursuit of the grievance and submission of the arbitrability dispute to an arbitrator. It declined to consider the effect of priority of action, res judicata and equitable estoppels defenses, "though these doctrines may also preclude [the Association] from obtaining the relief it is seeking." VR 13:14-19. It granted summary judgment in favor of the District

It is this ruling from which the Association appeals and now assigns error.

IV. ARGUMENT

A. Standard of Review.

In reviewing summary judgment, the appellate court conducts *de novo* review of the record before the trial court. *Estate of Haselwood v. Bremerton Ice Arena*, 166 Wash.2d 489, 497, 210 P.3d 308 (2009). All factual inferences shall be viewed in favor of the party against whom summary judgment was entered. *Id.*

B. Because the CBA Provides that Arbitrability Disputes are the Province of the Arbitrator, the Superior Court Erred in Applying Both Election of Remedies and Waiver Defenses to Preclude the Submission of this Issue to an Arbitrator.

There is a long-standing, strongly established public policy in Washington favoring arbitration of contractual disputes. *Davidson v. Hensen*, 135 Wash.2d 112,, 954 P.2d 1327 (1998); *accord, International Association of Fire Fighters Local 46 v. City of Everett*, 146 Wash.2d 29, 51, 42 P.3d 1265 (2002) (applying Public Employees Collective Bargaining Act, RCW 41.56.010 et seq.); *see also, Yaw v. Walla Walla Schl. Dist. No. 140*, 106 Wash.2d 408, 411, 722 P.2d 803 (1986).

Grievance arbitration proposes to resolve disputes arising under collective bargaining agreements. *City of Bellevue v. International Association of Fire Fighters Local 1604*, 119 Wash.2d 373, 831 P.2d 738 (1992). Arbitration is given this preferential status in order to facilitate conflict resolution without the involvement of the courts, and as an expeditious and inexpensive alternative to litigation. *Id.* Public sector labor statutes in Washington besides the Educational Education Bargaining Act evince legislative support for contract grievance arbitration. *See,*

e.g., RCW 41.56.122(2) (Public Employment Collective Bargaining Act); 41.80.030(2)(a) & 41.80.130 (State Collective Bargaining Act); 41.76.040 (Higher Education Bargaining Act).

As a matter of separate, independent and individual protection, RCW 28A.405.300 provides that a teacher employed by a public school district properly informed by the Superintendent that his contract with the District will be terminated for cause has ten (10) calendar days to submit a written request that the proposed decision be reviewed by a hearing officer. The result of timely written notice to the school district carries with it the right to a hearing under the enumerated procedures codified within RCW 28A.405.310. These rights appear at law separately and independently from any originating within the realm of the collective bargaining relationship between a school district and the certificated personnel within its employ.

By contrast, the Educational Employment Relations Act (“EERA”), RCW 41.59.010 - .950, regulates the collective bargaining relationship between the District and its employees through an organization that is the majority representative. The law is explicit that the relationship is created through its provisions as one between the “representatives of the employer and the

exclusive bargaining representative. . .” RCW 41.59.020.¹⁰ and that employees have the right to either select or not select such an exclusive representative. RCW 41.59.060(1);

The EERA, as a matter of enunciated legislative policy, under the heading “Binding arbitration procedures authorized,” further provides that the arbitration of such “disputes as may arise involving the interpretation or application of [a collective bargaining] agreement” is encouraged. RCW 41.59.130.

The importance of this right is further outlined in another part of the EERA that emphasizes the scope of the relationship between an association functioning as the exclusive representative, and its member employees as individuals:

[A]ny employee may at any time may present his grievance to the employer and have such grievance adjusted without the intervention of the exclusive bargaining representative, as long as such representative has been given an opportunity to be present at that adjustment and to make its views known, and *as long as the adjustment is not inconsistent with the terms of a collective bargaining agreement then in effect.*

RCW 41.59.090 (emphasis added).

Plainly stated, not only does the EERA encourage resolution

¹⁰ The EERA clarifies and distinguishes between “employee organizations,” which exist for the purpose of collective bargaining, RCW 41.59.020(1) and “employer[s]” which include “any school district.” RCW 41.59.020(5).

of grievances between represented employees and their employer through a contract dispute resolution mechanism, but it recognizes the separate, though mutually connected relationship, between the Association selected to represent a majority of employees, and the individual employee himself.

The collective bargaining agreement between the Association and the District provides a detailed process for resolution of grievances consistent with this statutory grant. Article 4.2, entitled "Just Cause," expressly states that

"No employee shall be warned, reprimanded or suspended, without pay, *or discharged without just and sufficient cause.* The specific grounds forming the basis of such disciplinary action will be made available to the employee and to the Association in writing.

CP 108.

Another unnumbered paragraph within Article 4.2 specifies that

The District agrees to follow a policy of progressive discipline, which normally includes in this order: verbal warning, written reprimand, suspension without pay, and discharge. Any disciplinary action taken against an employee shall be appropriate to the behavior that precipitates said action."

Id.

The CBA confers employees with the right to challenge proposed discharge for “just and sufficient cause” through a negotiated grievance mechanism. Article 9.2 defines a grievance in the following manner:

“[A] claim that an existing contract term, school district regulation, rule, or policy has been misinterpreted, misapplied, violated, or applied inequitably as to a grievant. As to an individual employee grievant, a grievance may also mean a claim in an area not covered by the foregoing, that the grievant is being, or has been, treated unfairly, arbitrarily, or capriciously by the District.

CP at 110.

Thus written, a grievance challenging discharge for lack of “just and sufficient cause” is appropriate based upon the connected provision from Article 9.2 that “an existing contract term, . . . regulation, rule, or policy has been misinterpreted, misapplied, violated, or applied inequitably as to a grievant. . . .” However, that does not limit such disputes to disciplinary matters.

Unlike the notice deadline under RCW 28A.405.300, the time for filing a grievance challenging discharge is twenty (20) days after receiving notice of the proposed discipline. *Id.*, Art. 9.3, “Time Limits.” A grievance progresses through a series of Steps wherein dialogue between the grievant, or his OHEA representative, or both, with OHSD administrators of increasing responsibility is to

occur. This process can culminate with an appearance before the School District's Board of Director. *Id.*, Art. 9.4. In the event the process does not resolve the grievance, the OHEA may advance the grievance to the arbitration stage. *Id.*, Art. 9.5.

The CBA further provides that disputes over arbitrability are for the arbitrator in the first instance. Article 9 contains the following critical language:

9.3 Arbitration. Grievances advanced to arbitration shall be submitted under and in accordance with the rules of the American Arbitration Association (AAA). Other agencies or organizations, including the . . . Federation Mediation and Conciliation Service may be chosen to provide arbitration services by consent of both parties. In the event the parties are unable to agree on an arbitrator, the arbitrator will be chosen in accordance with the arbitration rules as established by the selected arbitration service. The arbitrator's decision will be rendered within twenty (20) days from either the date of the close of the hearing or receipt of briefs filed by the parties. The arbitrator's decision will be in writing and will set forth his/her findings of fact, reasoning, and conclusion on the issues submitted. *Any question of arbitrability shall be decided by the arbitrator.*

CP 109 (emphasis added).

The CBA contains the following additional language at Article 9.7 under the heading "Exclusion of Certain Matters" which clarifies the scope of disputes that are properly to be submitted to arbitration:

Matters for which another method of review is *required as the sole method of review* shall be excluded from this grievance

procedure. Nothing contain herein shall be construed to prevent the District of employee(s) from complying with notices or time limits otherwise required by law.

CP 110.

There are two points of disagreement between the District and the Association that arise in the present appeal. And both of these require interpretation of the CBA.

The first is that employees who are disciplined by the District may utilize the grievance procedure to challenge that discipline. The second is that disciplinary grievances – or any matter that originates as a grievance - may not be pursued to arbitration under the collective bargaining agreement if there is a “method of review” that is “required as the sole method. . . .” The CBA does not identify those sources that provide the “sole method” of disposition of disputes exists as an exception.

Though never discussed before the court, as there was no inquiry from the Judge as to what would be covered under this provision, for to so request would require an interpretation of contract language, numerous examples abound that would potentially fall within the terms of this exclusion, e.g., retirement credit disputes, workers compensation or unemployment benefits eligibility, etc.

However, it is incumbent upon a party that wishes to avoid processing a grievance to arbitration under the CBA provisions to identify those “sole methods of review” that come from another source before this claim would be an effective defense. In this case, the District failed to present to the lower court a single source that mandated the submission of James Pruss’ termination to another forum. The reason is clear for that omission: nothing within RCW 28A.405.300 & .310 compels a teacher-member of an exclusive representative organization to forego the right to grievance arbitration of disciplinary disputes. Even if that were the case, the defense pertains to one of arbitrability rather than a defense against the submission of the matter at all to an arbitrator. The CBA clearly confers an arbitrator with such authority to so decide.

Whether the merits of a grievance are appropriate for submission to an arbitrator raises a question of substantive arbitrability. *Mt. Adams Schl. Dist. v. Cook*, 150 Wash.2d 716, 724 (2003). Disputes over the substantive arbitrability of a submission differ from those which are of a procedural nature, the latter always falling within the exclusive jurisdiction of an arbitrator to decide in conjunction with the underlying merits of the disputed issue. *See, e.g., Yakima County Law Enforcement Officer Guild v Yakima*

County, 133 Wash.App. 281, 288, 135 P.3d 558, 561 (Div. 3 2006),
citing, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 556-57
(1967).

The Washington Supreme Court has adopted the federal axiom that questions of substantive arbitrability are for the courts to decide unless the parties' negotiated agreement "clearly and unmistakably" preserves the submission of that issue to an arbitrator. *Mt. Adams supra*.

In *Mt. Adams School Dist.*, the underlying dispute concerned a teacher's nonrenewal by his employer, and an attempt by his union to challenge that action through the contract grievance procedure. The school district claimed the matter was not arbitrable; the union and teacher argued to the contrary.

The parties' collective bargaining agreement in that appeal contained two relevant provisions. The court first recognized that the term "grievance" was broadly stated where it defined such a filing as "an alleged violation, misinterpretation, or misapplication of the Collective Bargaining Agreement." *Id.* at 720.

The collective bargaining agreement further provided that a discharged employee, the union or the District could have the

matter heard through grievance arbitration, rather than the statutory appeal process. *Id.*

Preliminary to its analysis, the *Mt. Adams* majority recited several critical maxims that will find controlling application in this case:

(1) Although it is the court's duty to determine whether the parties have agreed to arbitrate a particular dispute, the court cannot decide the merits of the controversy, but may determine only whether the grievant has made a claim which *on its face* is governed by the contract. (2) An order to arbitrate should not be denied unless it may be said with positive assurance the arbitration clause is not susceptible of *an* interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. (3) There is a strong presumption in favor of arbitrability; all questions upon which the parties disagree are presumed to be within the arbitration provisions unless negated expressly or by clear implication.

Id at 723, citing, *Peninsula Schl. Dist. v. Public Schl. Employees of Peninsula*, 130 Wash.2d 401, 413-14 (1996); (emphasis added).

The principles enunciated therein originated from a trio of 1960 decisions issued by the United States Supreme Court, collectively referred to as “the Steelworkers Trilogy.” *Id* at 723 & n.1.

In *Mt. Adams*, the court observed that the parties had expressly agreed within their collective bargaining agreement that both substantive and procedural arbitrability disputes should be submitted to an arbitrator. As the majority made clear on this factor:

“Here the MAEA and the District have clearly and unmistakably agreed to allow an arbitrator to decide whether a grievance is arbitrable. The language of . . .the collective bargaining agreement could not be clearer when it provided, ‘the merits of a grievance and the substantive and procedural arbitrability issues arising in connection with that grievance may be consolidated for hearing before an arbitrator.’ ”

Id. at 724-25.

While the parties in *Mt. Adams* crafted the contract submission language to specifically identify both the substantive and procedural elements of arbitrability, the CBA before the court in this appeal provides an even broader statement as to the scope of disputes to be submitted to an arbitrator. Without specifying that both substantive and procedural, or one type and not the other, are within the exclusive province of an arbitrator’s decision-making authority, the CBA instead clearly and unmistakably states that the submission of any and all arbitrability questions, regardless of type or character, must be to present to an arbitrator for disposition. No other reading of the language would make sense.

Because this is language negotiated by the parties under the relationship parameters imposed by the Educational Employment Relations Act, RCW 41.59. *et seq.*, it is clear that an interpretational dispute has its genesis in the contract language. And it is

undisputed as a matter of law that the meaning to be given negotiated contract language is the exclusive province and responsibility of the arbitrator. *Kelso Civil Service Cmmn. v. City of Kelso*, 137 Wash.2d 166, 174, 969 P.3d 474, 479 (1999).

The Superior Court disagreed with the application of the *Mt. Adams Schl. Dist.* holding. In rendering his oral ruling, the judge summarily rejected its application. However, despite the assurance from the court that “close examination” rendered both *Mt. Adams* and *Yakima County Law Enforcement Officers Guild* cases inapplicable, the court failed to provide any fact that would distinguish the use of their holdings in this case. The court ruled that

“In both these cases the issues had to do with the proper construction of the [CBA] itself and whether under the terms thereof the grievant had a right to arbitration. By contrast in the present case, the District’s defenses to [the Association’s] contention that Mr. Pruss has the right to pursue arbitration under the collective bargaining agreement *are not based on the collective bargaining agreement, but rather on independent principles of law.*”

VR at 7: 2-10.

This holding unjustifiably marginalizes the effect of these precedents, and in ignoring the clearly enunciated rules of law that each provides, summarily mischaracterizes the issue in dispute between the parties. What is being submitted here is not the merits of Mr. Pruss' grievance, but the issue of whether his grievance is arbitrable under the foundational facts of this appeal through the collective bargaining agreement. And that is a matter for an arbitrator, and not the court.

The lower court's failure to recognize this distinction is a critical misstep, and the superior court's failure to give both *Mt. Adams* and *Yakima County Law Enforcement Guild* controlling application is reversible error.

The *Mt. Adams* case plainly stated that a clear and unmistakable arbitrability referral clause required submission of that issue to an arbitrator. The *Yakima County* decision identified waiver, laches, and those related defenses as appropriate for submission to, and review and disposition by an arbitrator. The lower court did not conduct an analysis of the arbitrability clause to determine if it clearly and unmistakably required submission of the dispute over proceeding on the merits of the termination grievance to an arbitrator. It simply said that *Mt. Adams* did not apply.

The court also did not address why *Yakima County Law Enforcement Guild's* holding on employer defenses as they related to arbitrability were of an extracontractual effect. While the court may be correct that these defenses originate from “independent principles of law,” their impact on rights attendant to the CBA are limited to an interpretation of the CBA terms.

As pointed out previously, Article 9.7 precludes submission of any grievance to arbitration where another “sole method of review” exists. Nothing has been presented to the court in support of such a conclusion. In any event, it would not matter because the exclusion was negotiated by the parties, it is solely preserved within the contract and not the law, and contrary to the superior court’s conclusions, the law does not as a matter of independent authority preclude the simultaneous submission of matters to both a statutory hearing officer under RCW 28A.405.300 & .310, and an arbitrator whose authority originates within the confines of the CBA.¹¹

¹¹ It must also be brought to the court’s attention that RCW 41.59.920 states that its provisions cannot be “construed to deny or otherwise abridge any rights, privileges or benefits granted by law to employees.”

Furthermore, RCW 41.59.910 creates supremacy over rights arising under the EERA and those within other statutes that may conflict. See, *Peninsula Schl. Dist. v. Peninsula Schl. Employees Assn*, 130 Wash.2d 401, 407-08, 924 P.3d 13 (1996), wherein the supreme court found that

In this respect, the principal, controlling ruling appears within *Civil Service Commn v. City of Kelso*, 137 Wash.2d 166, 969 P.2d 474 (1999). Therein, a local civil service' commission upheld discipline for a police officer under applicable ordinances, but an arbitrator in a parallel proceeding found there was no just cause under the applicable CBA for the employee's suspension and rescinded the discipline. The court found neither principles of *res judicata* nor waiver precluded enforcement of the arbitrator's conflicting award. Citing the different standards applicable in each forum, the Supreme Court upheld the arbitrator's ruling.

In the present case, the principle for discharge arising under statute is a preponderance of evidence in support of a school district superintendent's "notice of probable cause." RCW 28A.405.310(8). By contrast, and as adopted by the *Kelso* court, "just cause" protections originating within a collective bargaining agreement require an independent, separate assessment distinguished by consideration of seven interconnected factors. 137 Wash.2d at 173.

provisions of the state statute authorizing one-year individual employment contracts for school employees was secondary to the collective bargaining law that authorized three-year negotiated agreements by the employees' exclusive representative.

The *Kelso* ruling is of significant value here in that it recognizes the validity of parallel, assertable, independent rights. The Supreme Court found that principles of *res judicata* and “priority of action” defenses did not preclude the enforcement of a conflicting arbitration award. The Court noted that avoidance of duplicate, conflicting rulings was something to be resolved through collective bargaining, and an adjustment to the parties’ CBA, and not through summary application of legal defenses in court-initiated litigation. 137 Wash.2d at 176.

Despite this holding, the superior court ignored the foregoing rule of law in this case – it applied what it perceived to be legal defenses whereas the contract language only precludes submission of grievances to arbitration where a remedy outside the CBA is “the sole remedy” provided. The court did not conduct an analysis of the statutory defenses within the scope of the “sole remedy” exception. It merely applied the defenses raised by the District outside the four corners of the CBA. In doing so, it committed reversible error.

It has been pointed out that CBA’s arbitrability clause clearly and unmistakably requires the submission of the issue to an

arbitrator.¹² The court ignored this in its analysis. The court engaged in no analysis of the contract language to determine if it was susceptible to arbitration, it merely applied the District's defenses to the contract provisions that are in dispute.

C. The Superior Court Erred in Finding that Both Election of Remedies and Waiver Defenses Precluded Submission of the Arbitrability Grievance to an Arbitrator for Resolution.

The superior court ruled that of the several defenses raised by the District in its Motion for Summary Judgment to the Association's demand to proceed to arbitration, both the Election of Remedies and Waiver doctrines rendered the dispute inarbitrable. Without conceding that the court's ruling was a correct resolution of the suit, the Association asserts that the court misapplied the defenses upon which it reached its decision.

The superior court, in its bench ruling, found that an election of remedies and waivers of action doctrine determinative of the case. AS pointed out in the Statement of the Case, the judge relied upon several cases and found them controlling. To the extent these defenses were analyzed by the court, they were improperly considered and applied to the facts in this case.

¹² In fact, an arbitrator has already been selected and awaits resolution of this issue by the courts. CP 289-291.

1. The Election of Remedies Ruling Misapplies the Case Law.

The doctrine of election of remedies is “a rule of narrow scope,” and its “sole purpose” is to prevent a plaintiff from recovering twice for the same wrong. *Lange v. Town of Woodway*, 79 Wn.2d 45, 49, 483 P.2d 116 (1971). Three elements must be present before a party will be held bound by an election of remedies: (1) two or more remedies must exist at the time of the election; (2) the remedies must be “repugnant and inconsistent” with each other; and (3) the party to be bound must have chosen one of the two remedies. *Id.*

Typically, two remedies will be deemed inconsistent if “the assertion of one involves the negation or repudiation of the other, as where one of them admits a state of facts and the other denies the same facts, or where one is founded upon affirmance and the other upon disaffirmance of a voidable transaction.” *Willis T. Batcheller, Inc. v. Welden Const. Co.*, 9 Wn.2d 392, 404, 115 P.2d 696 (1941).

Here, Mr. Pruss did not have a choice between two inconsistent and repugnant remedies. Rather, he had a choice between two separate mechanisms for challenging his termination:

a statutory hearing or a grievance under the contract. These two procedures would only meet the “inconsistency” element if, by being permitted to pursue both avenues of redress, Mr. Pruss would recover twice for the same wrong. However, there is no threat of such harm in this case because Mr. Pruss did not pursue the statutory hearing to final judgment. As such, there was no recovery in that action and therefore no possibility of double redress if the grievance is permitted to proceed.

The superior court's primary reliance upon the Supreme Court's holding in *Birchler* does not support its conclusion. In *Birchler v. Castello Land Co.*, 133 Wn.2d 106, 942 P.3d 968 (1997), the plaintiff was brought suite under a specific statute, RCW 64.12.030, which provided for treble damages against another who unlawfully removed or damaged trees. While the court enunciated the “election of remedies” rule of law, it only found the elements inapplicable to an emotional distress claim that was brought in conjunction with the statutory action.

The present facts are not merely distinguishable, but the issue raised by the statutory action was one of punitive damages for separate torts, i.e., destruction of property (notably “trees”) as

well as the resultant emotional distress asserted under the common law that was directly caused by the statutory violation.

In *Hill v Cox*, 110 Wash.App. 394, 41 P.3d 495 (2002), the Third Division noted that *Birchler's* election of remedies holding principally applied to the pursuit of the statutory or common law remedy, where the statutory remedy was of a punitive nature. However, the court also noted that the party who elected between remedies did so before trial in the one action commenced. The other party demonstrated no prejudice, and therefore an election defense was inappropriate.

Here, despite the holdings in the foregoing cases, James Pruss did elect his remedies. While he pursued his statutory appeal at the same time the Association pursued his grievance, there was no final ruling, no outcome, no holding that would have created prejudice against the District.

In *Leija v. Materne Bros., Inc.*, 34 Wn. App. 825, 827-28, 664 P.2d 527 (1983), the court held that res judicata did not bar the plaintiff from filing a second wrongful death suit after she voluntarily dismissed the first suit following the denial of her summary judgment motion because the voluntary dismissal was not a final judgment on the merits. Likewise, in *Redfield v. Johnson*, 159

Wash. 39, 44, 291 P. 1077 (1930), the Supreme Court ruled that the plaintiff's voluntary nonsuit "did not constitute a bar to any subsequent proceedings on the same cause of action. It was not a judgment on the merits of the cause of action; it was at most but a confession that they had mistaken their remedy."

Though not within the realm of an election of remedies case analysis, these holding show the importance of finality in any consideration of a party's actions related to multiple remedial choices. Preparing for litigation is not final, nor is it unduly prejudicial to the adverse party. In all respects, it would be expected that the defense prepared by the District in the statutory hearing would no doubt be of use in any arbitration on the merits of Mr. Pruss discharge, though there is nothing in the record to so indicate but the court did not inquire of any actual prejudice suffered by the District other than the expense of defending itself. Such an expense, however, is clearly anticipated by the structure of applicable law (RCW 28A.405.300 and .310), and the inclusion of a negotiated provision within the CBA allowing for resolution of contract disputes up to and concluding with grievance arbitration.

Suffice to say that without a ruling from the hearing officer, the elements of election of remedies were not met. There is nothing

“repugnant and inconsistent” between proceeding to arbitration and proceeding to a statutory hearing. And the Supreme Court’s ruling in *City of Kelso* clearly suggests that the presence of two independent, simultaneous remedies in separate forums is not inherently repugnant: inefficient, perhaps, but something that should be negotiated. The parties have done so here, and required that an arbitrator resolve disputes over language that pointedly governs the arbitration process.

2. Neither the Facts nor the Law Support a Finding that a Waiver of the Right to Pursue Arbitration Occurred.

The superior court principally relied upon *Ives v. Ramsden*, 142 Wash.App. 369, 174 P.3d 1231 (2008), and *Otis Housing Assn v. Ha*, 165 Wn.2d 582, 201 P.3d 309 (2009) in finding that both Pruss and/or the Association had waived their respective rights to proceed to arbitration. Neither case is factually comparative, therefore reliance upon the basic holdings of these cases is error.

In *Ives v. Ramsden*, the defendant was a securities broker who sold various investments to and also borrowed money from Mr. Ives. At some point in their relationship, the parties executed an agreement agreeing to arbitrate any disputes that might arise between them. After Ives died, his estate sued Ramsden for,

among other things, breach of fiduciary duty and securities fraud. For three and one-half years, Ramsden fully and vigorously defended the lawsuit. Just before trial, Ramsden, as defendant, moved to dismiss the complaint arguing *for the first time since the action was commenced* that the dispute should have been submitted to arbitration. In other words, he raised arbitration as an affirmative defense. (Ramsden also argued that because the statute of limitations had run, the matter should be dismissed).

The appellate court affirmed the lower court's ruling that Ramsden had indeed waived his right to invoke arbitration by failing to raise it earlier in the proceedings. By participating in the litigation for three and a half years before ever even mentioning the arbitration contract, the court found conduct "inconsistent with any other intention" but to forego the right to arbitrate.

Such is not the case here. Mr. Pruss pursued his statutory appeal; the Association pursued its grievance through the CBA process seeking arbitration as an end result. The District was fully informed of both proceedings, and the possibility of simultaneous litigation in both forums. Despite the fact that Mr. Pruss prepared for his statutory appeal, the District was never unaware of the effort to invoke arbitration. Thus, the unique and distinctive facts the

provide the foundation of *Ives* do not support the court's present ruling on waiver in this appeal.

Likewise, in *Otis Housing Ass'n Inc. v. Ha*, the parties executed an option contract to purchase certain real estate, which contained an arbitration provision. Otis Housing (OHA) announced its intent to exercise the option but was unable to complete the purchase within the option period. Thereafter, the Has brought an unlawful detainer action. OHA defended against the unlawful detainer action, arguing that it had exercised the option and was therefore entitled to possession. OHA did not invoke the arbitration clause as an affirmative defense in its answer nor during the unlawful detainer proceedings. Several days after the trial court issued a writ of restitution, OHA demanded arbitration. After the Has declined to arbitrate, OHA filed an action to compel arbitration.

The Supreme Court held that the foregoing conduct by OHA constituted a clear and unmistakable waiver of the right to arbitration by failing to timely invoke the right and by raising the option as a defense in the unlawful detainer action. Because the trial court ruled on the issue of whether the option had been successfully exercised, OHA was not permitted to "relitigate" this issue by submitting it to an arbitrator for resolution.

Both of these cases are simply distinguishable from the present dispute between the District and the Association. In each, defendant failed to raise an arbitration clause as a defense to a civil action instituted against it. Instead, in each instance, the defendants answered and defended against the actions, and only much later – in some cases after a judgment had issued – sought to invoke the right to arbitrate. Under these fact patterns, the appellate courts were required to conclude that the defendants had, indeed, waived the right to arbitrate.

The court in *Ives* relied upon the generic elements of waiver pronounced by the appellate court in *Shoreline Shl. Dist. v. Shoreline Assn of Educational Office Employees*, 29 Wash.App. 956, 631 P.2d 996 (Div. 1 1981), as did the superior court in the present appeal. However, the facts of and the court's ruling within *Shoreline* contradict the lower court's expressed understanding of the holding.

The *Shoreline* opinion acknowledged that a labor organization may waive its right to demand contractual arbitration where it pursues litigation independently. It uses the term "ignored" to describe the connection between litigation, which is pursued, and arbitration, which is not. Though the court decision is brief in its

discussion of the underlying facts, it is clear that there is nothing within its outline of the lower proceedings suggesting that the association did not pursue the grievance to arbitration. In fact, the litigation was brought by the employer, which raised procedural deficiency arguments against proceeding to arbitration. And though the court of appeals did not conduct an arbitrability analysis in determining the validity of the demand to proceed to arbitration, it did conclude that the record did not support a finding that a waiver had occurred.

Here, while Pruss pursued his statutory appeal, the Association simultaneously pursued a grievance on his behalf. At no time did the Association relinquish pursuit of the grievance, or otherwise abandon its pursuit. There is nothing in the record to support such a finding, and the superior court fails to cite a single shred of evidence to support that conclusion.

Instead, the record reflects that the Association repeatedly, throughout the summer months of 2007, asserted the continuing viability of the grievance, and the need to proceed to arbitration. The record simply doesn't support any finding that the Association abandoned, ignored, withdrew or otherwise acted in a manner that reflected intent to not proceed with the grievance to arbitration.

The court still concluded that the Association waived its right to proceed. But the record is devoid of any evidence in support of that conclusion. Even if there is the suggestion, which there is not in the record before this court, any factual inferences must be resolved in favor of the nonmoving party, i.e., the Association. As the record only shows that the Association continued to pursue its grievance to an arbitration level, and was only stymied by the District's refusal to accept the grievance's progressing through the steps past the Superintendent, nothing supports a finding of waiver.

The Association would call to the court of appeals attention the need to recognize that the superior court has erroneously conflated the rights of James Pruss against those of the Association, acting on his behalf but also as an independent gatekeeper of the arbitration process. Mr. Pruss' rights under statute (RCW 28A.405.300 & .310) are conferred upon him individually. The rights originating within the CBA were negotiated and enforced by his Association. The Association retains the authority to refuse to advance Pruss' grievance to arbitration, subject over to its duty to fairly represent him. *See, Minter, supra*. Mr. Pruss does not have the unencumbered right to demand that the Association do so. The Association, by contrast, does have the

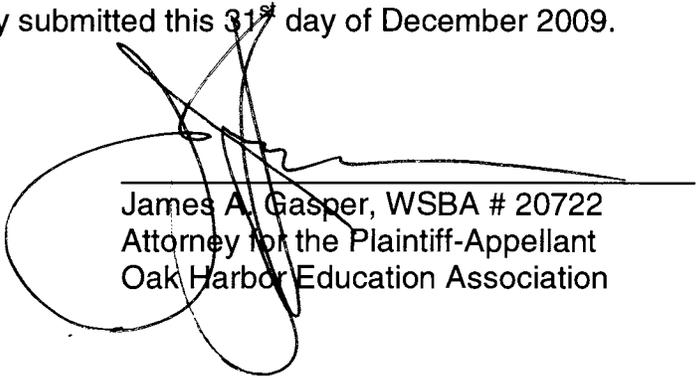
right to insist that disputes arising under its CBA with the District be submitted to and decided by an arbitrator. That expectation is the foundation of the contract arbitration process.

CONCLUSION

For the foregoing reasons, the appellant Oak Harbor Education Association submits that the Superior Court for Island County, Honorable Alan Hancock, committed reversible error in ruling that the parties' dispute over submission of an arbitrability grievance to an arbitrator for resolution should be dismissed.

The Association urges the appellate court to direct the parties to proceed to arbitration over the arbitrability of the grievance as to whether James Pruss is foreclosed from proceeding to arbitration on the merits of his termination from employment by the District. In reaching such a result, the Association requests that the court overrule and vacate the contrary ruling of the superior court.

Respectfully submitted this 31st day of December 2009.



James A. Gasper, WSBA # 20722
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IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON, DIVISION I

OAK HARBOR EDUCATION
ASSOCIATION,

Appellant,

vs.

OAK HARBOR SCHOOL
DISTRICT,

Respondent.

No. 64108-5

Lower Court Case
No. 07-2-00654-5

CERTIFICATE OF SERVICE

I, John Charles Hardie, hereby declare that on December 31, 2009,
I caused a copy of Brief of the Appellant to be served on opposing
counsel, named below, by sending a true copy of the same by hand
delivery:

Lawrence B. Ransom
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DATED this 31st day of December, 2009.

A handwritten signature in black ink, appearing to read 'JCH', written in a cursive style.

John Charles Hardie
Legal Assistant to James A. Gasper